1964

Edward L. Gillmor et al v. Elwood B. Carter dba Service Salt Company : Petition for Rehearing

Utah Supreme Court

Allen H. Tibbals; Attorney for Plaintiffs-Respondents;

William H. Henderson; Attorney for Defendant-Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

EDWARD L. GILLMOR, EDWARD LESLIE GILLMOR and C. FRANCIS GILLMOR, JR. and the ISLAND RANCHING COMPANY, formerly known as Island Improvement Company,

Plaintiffs and Respondents,

vs.

ELWOOD B. CARTER dba SERVICE SALT COMPANY,

Defendant and Appellant.

Case No. 9993

PETITION FOR REHEARING

Appeal from a Summary Judgment of the District Court of Salt Lake County, Hon. A. H. Ellett, District Judge

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The appellant respectfully petitions for a rehearing in the above matter for the following reasons:

1. THE DECISION OF THE COURT IS UNINTELLIGABLE IN THE LIGHT OF THE RECORD AND POINT UPON WHICH APPELLANT RELIED UPON APPEAL. THE

COURT ENTIRELY MISCONSTRUED THE ISSUES INVOLVED IN THIS CAUSE.

(a) *The Supreme Court's Misconception of the Issues in This Cause.*

Here is how the Supreme Court misconstrued the issues and then proceeded to try the case upon affidavits and deposition on this incorrect issue.

The Supreme Court conceived plaintiff's issue to be that he had acquired a prescriptive right by *personally using* the road in controversy for over 30 years:

> "He [appellant] also averred that he had acquired a prescriptive right by using said road openly and freely for a period of over 30 years."
> —(P. 1, para. 2, Opinion).

Appellant's *personal* use of the road for the prescriptive period was not the issue as we hereinafter show.

The Supreme Court then observed from appellant's deposition, that appellant had only used the road for the purpose of hauling salt *personally* only a year and a half before the commencent of this suit:

> "His [appellant's] use of the road for the purpose of hauling salt, however, commenced approximately only a year and a half before the commencement of this suit."
> —(P. 1, para. 3, Opinion).

The court then proceeds to rule that because appellant admitted he had only used the road personally to

haul salt for only a year and a half, he couldn't have used it for 30 years, and obtained a prescriptive right: (P. 2, para. 4).

> "By appellant's own admission in his deposition he had used the road for hauling salt only approximately one and one-half years before this action was started. He therefore could not have acquired a prescriptive right for the use of the road for such purpose."

This is all very fine, but this was not the issue. Plaintiff did not claim his prescriptive right to use the road to haul salt was by virtue of only his *personal* use of the road for 30 years. Appellant's claim was the State of Utah, owner of the leased land had, by virtue of appellant's use of the road to haul salt, together with the use of the road for this purpose by appellant's predecessors (prior lessees) the State of Utah, lessor, had acquired a prescriptive right to haul salt from said state salt lands which appellant leased from the State of Utah, all as appears in Point 2 following.

2. THE ISSUES WHICH PLAINTIFF RELIED UPON IN THIS CAUSE AND THE POINT UPON WHICH APPELLANT RELIED UPON ON THIS APPEAL.

Plaintiff did not base his right to haul salt upon the road solely upon his own use of the road for such purpose, because he had only personally used the road for that purpose for more than a year and a half or so. Appellant's claim was that appellant *and his predeces-*

sors in interest had together obtained a prescriptive right to use the road. Thus the pleadings were,

> "Continuously and for a period of more than 30 years prior thereto, the defendant *and his predecessors in interest* had used freely and openly and without restraint,"

the road in controversy. (See page 5, Brief of appellant).

Briefly, the situation is this: Appellant leases salt lands from the State of Utah for his salt business. The road in controversy is the road which has been used to haul salt from these lands. Appellant claims there is an easement to use this road for the hauling of the salt appurtenant to the land that appellant leases from the state. The claim is that the easement was established by the state's use of the road to reach its salt lands and by adverse use of this road by state lessees from at *least* 1939 until 1962, a period of over 20 years. The State also used this road to reach State Lands and its use was not limited and restricted.

Appellant found it difficult to obtain affidavits from people, who for various reasons do not wish to become involved in the controversy. (P. 11, Brief). It has been said:

> "Hear one side and you are in the dark. Hear both sides and all will be clear."

But the affidavits which appellant did file (pages 93 to 105 of the record) show these leases—and the Thomas affidavit specifically show adverse and open

use beginning 1939. (See Point II, page 13-14, appellant's Brief).

The law is clear. Appellant claims an easement appurtenant to the salt lands he leased from the State of Utah acquired by use of the road in controversy by the state and by lessees of the state who hauled salt from the state salt lands. Such an easement would be appurtenant to the lands. As is stated in 17 (a) Am. Jur. Prud., page 733, 735, sec. 149:

> "An appurtenant easement is incident to an estate in land and passes to said lands."
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> * * * *
>
> "Moreover, it is immaterial whether the land is conveyed for a term of years, for life or in fee."

It is also well established that the landlord may acquire an easement by adverse use over the land of a third person by tenants, and that successive adverse uses may be tacked:

> "Adverse use of an easement over the land of a third person by a tenant under his lease inures to the benefit of the landlord so as to support the latter's right to such easement by prescdiption."—(32 Am. Jur. P. 44, Sec. 20).
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> "Tacking users - The rule generally followed in most jurisdictions is that to make up the period required for the acquisition of a prescriptive easement, successive adverse users by different persons may be tacked if there is privity between such persons. Thus the adverse use of an easement over the land of a third person by a tenant

under his lease inures to the benefit of the landlord so as to support the latter's right to such easement by prescription."—17 Am. Jur. P. 696, Sec. 81).

As the easement acquired was appurtenant to the salt lands of the state, the appellant herein as lesse of these salt lands, had the right to use this easement. The facts are not complete, but the issue was squarely met. Plaintiff claims a right to use the road by his use and by use of his predecessors in interest. He produces affidavits further framing this issue. The case should not be tried on these affidavits or on deposition. It should be tried!

3. THE SUPREME COURT SHOULD NOT ADJUDGE THE ISSUE OF PUBLIC ROAD ON RESPONDENT'S AFFIDAVITS AND APPELLANT'S DEPOSITION.

Appellant feels it should mention one other point. Plaintiff pleaded the issue that the road was dedicated to public use (page 5, appellant' Brief). Appellant did not file affidavits on this issue, deeming it could stand on this issue without the necessity of filing affidavits as this court ruled a party may stand, in *Christensen vs. Financial Service Co.*, 377 P (2d) 1010, (page 12, appellant's Opening Brief). This issue involved records and testimony of public officials. Such an issue shouldn't be tried by affidavit. Further, it would have been idle because the lower court ruled that because Salt Lake County had filed an action to declare the

road a public road, then without trial, dismissed it by stipulation with prejudice, no other action could ever be filed. This court did not review the District Court ruling. It tried the issue of public road on the deposition of appellant whose knowledge was limited, then gave conclusive weight on the affidavits of respondent and then citing a case which was tried on the merits and which we certainly don't quarrel with (***Morris vs. Blunt,*** 49 Ut. 248, 160 Pac. 1127, page 4) rendered this decision on the merits.

CONCLUSION

Appellant respectfully submits:

If this case is to be tried and judgment rendered by this court on the pleadings, depositions and affidavits (see p. 2, para. 3, Opinion), despite the decision of this court in *Christensen vs.* ***Financial Service Co.,*** supra, then at least it should be tried on the issue that was pleaded and relied upon by appellant.

If a party may not stand upon his pleadings as appellant reads the case of *Christensen vs.* ***Financial Service Co.,*** supra, to hold, this court should say so.

If individuals not parties to a suit, are forever bound because a county files a complaint to declare a road a public road and then, without trial, stipulates to dismiss it with prejudice, then we respectfully submit, the court should so rule.

Dated: June 11, 1964.

Respectfully submitted,

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